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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ESTEBAN MONTIEL, Defendant and Appellant.	H046204 (Santa Cruz County Super. Ct. No. 17CR07475)

Appellant Esteban Montiel appeals the trial court's denial of his motion to suppress evidence seized from him by the Watsonville Police Department. Montiel contends that the police detained him without reasonable suspicion; they lacked consent to conduct a patdown search of his pockets, and there was insufficient evidence to support the application of the "plain feel" exception to the warrant requirement. For the reasons explained below, we agree and reverse the trial court's order denying the motion to suppress.

I. PROCEDURAL BACKGROUND

In November 2017, Montiel was charged by complaint with carrying a loaded, unregistered firearm in public (Pen. Code, § 25850, subd. (a)).[1] In February 2018,

[1] Unspecified statutory references are to the Penal Code.

Montiel filed a motion pursuant to section 1538.5, subdivision (a)(1) to suppress "all evidence both tangible and intangible, obtained by the Watsonville Police Department as a result of the warrantless detention, search and arrest of defendant which occurred on November 22, 2017." On March 19, 2018, the trial court conducted the preliminary hearing and heard Montiel's motion to suppress evidence. (See § 1538.5, subd. (f).) We set out the evidence introduced at the preliminary hearing in our legal analysis of Montiel's claims.

In denying the motion to suppress, the trial court stated "based upon the circumstances and the testimony that has been in this particular case [*sic*] the Court finds that the search was in fact a valid search and seizure and the motion to suppress is respectfully denied." The trial court did not make any explicit findings or otherwise detail the basis for its ruling on the motion. The trial court also held Montiel to answer on the complaint.

The district attorney filed an information charging Montiel with carrying a loaded, unregistered firearm in public (§ 25850, subd. (a)). Montiel pleaded not guilty. In May 2018, Montiel filed a second motion to suppress evidence, seeking suppression of the same evidence argued in the earlier motion. In arguing the motion, both sides relied on the evidence elicited at the March 2018 preliminary hearing. (See § 1538.5, subd. (i).)

On June 1, 2018, the trial court denied Montiel's second motion to suppress. The trial court issued the following tentative order: "I've had an opportunity to review all of the moving papers, reviewed the appropriate law, reviewed the file and pleadings. My tentative is to respectfully deny this motion." After hearing argument from defense counsel in support of the motion, the trial court stated, "I'm going to adopt my tentative ruling and deny this motion." The trial court did not make any explicit findings or otherwise elaborate on the basis for its ruling.

Montiel waived his right to a jury trial and pleaded guilty to the count charged in the information. The trial court suspended imposition of sentence, placed Montiel on

three years of probation, and ordered him to serve 270 days in the county jail. The trial court imposed a number of other conditions of probation and ordered fines and fees. Montiel timely appealed the trial court's denial of his motions to suppress. (See § 1538.5, subd. (m).)

II. FACTS AND LEGAL ANALYSIS

Montiel argues that he was unlawfully detained by the police because the officers lacked reasonable suspicion that he was involved in criminal activity; he did not voluntarily consent to the patdown search; even if he consented to the patdown search, the officer exceeded its scope when he reached into Montiel's pocket; and the "plain touch" exception to the warrant requirement does not apply. Montiel contends that any evidence discovered after the illegal seizure of the pipe was a "fruit" of the unlawful search of his pocket that must be suppressed. (See *Wong Sun v. United States* (1963) 371 U.S. 471.)

Before discussing the merits of these arguments, we set out the facts relevant to Montiel's motion to suppress elicited during the preliminary hearing.

A. *Evidence from the Preliminary Hearing*

The parties stipulated the police did not have a search warrant or an arrest warrant before searching Montiel.

Aaron Chavarria was a police officer with the City of Watsonville. On November 22, 2017, at 7:00 a.m., Chavarria was on duty and on patrol. Chavarria and Officer Lopez conducted an "area check" of a motel in Watsonville "known for a lot of crime activity." Chavarria had "taken a . . . robbery report there," and there was "a lot of drug activity" and "a lot of car break-ins" at the motel. Chavarria was not looking for Montiel that day.

Officer Chavarria saw a "teenage female" who was carrying a 24-ounce can of beer "standing at the threshold" of room 129. When the female saw the patrol car, she went into room 129 and closed the door. Chavarria recognized Montiel, who was one of

two men standing next to a car parked in front of room 129. Chavarria recognized Montiel "from a prior case about a year ago where he was the suspect in a 245." Chavarria got out of his car, greeted Montiel and the other man, and began talking to them. Officer Lopez also got out of the car. The officers did not give the men any commands or directives.

Montiel told Officer Chavarria that "he was just arrested for gun possession about a week prior." Montiel was wearing a "puffy vest," and had on a long-sleeved shirt and baggy jeans. Chavarria could see a "bulge" in Montiel's right pant pocket. At the time of the preliminary hearing, Chavarria could not remember the size of the bulge.

Cortez was the other person standing with Montiel when the officers approached. Cortez owned the car next to which Cortez and Montiel were standing. The officers "ran [Cortez's and Montiel's] names" and discovered neither man was on probation or parole. Cortez gave Officer Lopez consent to search the car. Prior to beginning the search, Officer Chavarria told both Montiel and Cortez that they were free to leave and they were not being detained. Neither Montiel nor Cortez left.

Juan Bribiesca then arrived at the motel. Bribiesca was a police officer with the City of Watsonville who was working on November 22, 2017. Bribiesca went to the motel "to cover" Officers Chavarria and Lopez.

Officer Chavarria told Bribiesca that neither Montiel nor Cortez had been "pat searched for weapons." Chavarria believed this fact was relevant to the officers' safety because they were about to search the car and because Montiel had stated that he had been "arrested for firearm possession about a week before." Chavarria was concerned that, because he would be focused on the car during the search, Montiel and Cortez "could easily ambush me or cause harm to me or any of my coworkers if we weren't paying attention to them and they may have possessed a weapon." Based on Montiel's criminal history, Chavarria thought Montiel could have had a weapon. Bribiesca spoke with Montiel, who was wearing a "puffy black vest and baggy clothing."

Officer Chavarria heard Officer Bribiesca tell Montiel and Cortez "if they were going to hang around he'd like to pat search them for weapons." The prosecutor and Chavarria had the following exchange about Montiel's consent and Bribiesca's subsequent search of Montiel:

"Q. And you said that the defendant consented to the search. Do you recall exactly what he said?

"A. I don't recall.

"Q. But could you hear him consent to the search.

"A. Yes.

"Q. And did Officer Bribiesca then search him in your presence?

"A. Yes.

"Q. What, if anything, did he find?

"A. He immediately located a methamphetamine pipe in his left pocket. I made a mistake. In my report it says right pocket but he located it in his left pocket. And so he handcuffed him at that point and placed him under arrest for the methamphetamine pipe and then pursuant to the arrest he then searched the rest of his person and he located a firearm in his right pocket."

Other than this exchange, Officer Chavarria did not testify about the circumstances of Officer Bribiesca's discovery of the methamphetamine pipe.

Officer Chavarria was about 20 feet away from Officer Bribiesca and Montiel when Bribiesca and Montiel had this conversation. Montiel's attention "wasn't completely focussed [*sic*] on them. [He] remember[s] Officer Bribiesca asking [Montiel] for consent and him giving him consent to a pat search."

In response to defense counsel's question whether at that point the officers suspected Montiel or Cortez of a crime, Officer Chavarria testified, "We were kind of investigating the—they were speaking to the woman at the threshold of the door who appeared to be underage and was drinking the 24-ounce can of beer. So we were—we

were associating them together at the time. [*Sic*.] So there was [a] kind of investigation for providing alcohol to an underaged person." At that point, the officers did not know the age of the female, whether the men had given her any alcohol, or whether the men had been inside room 129.

Officer Chavarria read Montiel his *Miranda* rights.[2] Montiel waived his rights and said "he found the gun the night before at Ramsey Park underneath the Harkins Slough bridge." Montiel said he did not turn the weapon in to the police "because he likes guns." Montiel told Chavarria that Montiel had not given Bribiesca consent to search him.

The prosecutor had the following exchange with Officer Bribiesca about Montiel's consent to the search and Bribiesca's subsequent search of Montiel:

"Q. And did you ask the defendant whether or not he would consent to a pat search of his person?

"A. I did.

"Q. Tell us about that conversation.

"A. So prior to that Officer Chavarria told me that [Montiel] had been arrested about a week prior for a gun charge and gun possession. So I directed my attention toward him. I told him I would be conducting a pat down for weapons and he agreed. He gave me consent to pat him down for weapons. I explained to him that it would not consist of me going in his pockets.

"Q. And when you asked him for consent how did you ask him?

"A. I told him if it was okay to conduct a pat down for weapons.

"Q. And what was his response?

"A. He said yes.

"Q. And when you patted him down did you find anything?

"A. Yes.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

"Q. What did you find?

"A. I located a glass methamphetamine pipe in his left pant pocket.

"Q. And once you found that pipe did . . . you have more conversation[s] with the defendant?

"A. Yes. When I retrieved the pipe from his left pant pocket he turned to me and he told me that he no longer gave me consent to continue my search. I told him that at that point he had been placed under arrest for possession of unlawful paraphernalia and I continued my search incident to arrest.

"Q. And when you continued the search incident to arrest did you find anything else?

"A. Yes. From his right pant pocket I retrieved a loaded .22-caliber pistol."

Other than this exchange, Officer Bribiesca did not testify about the circumstances of his discovery of the pipe.

Montiel testified at the preliminary hearing about his interaction with Officers Chavarria and Bribiesca on November 22. Montiel's counsel asked him, "Did [Bribiesca] ask for your permission to search you or did he just tell you he was going to search you?" Montiel responded, "Just tell me. [¶] . . . [¶] He told me he was going to search me."

B. *Legal Analysis*

"A warrantless search is presumptively unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search." (*People v. Simon* (2016) 1 Cal.5th 98, 120 (*Simon*).) When reviewing a trial court's ruling on a suppression motion, "an appellate court independently applies the law to the trial court's factual findings, determining de novo whether the findings support the trial court's ruling." (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1006.) "[W]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. [Citation.] And in determining whether, on the facts so found, the

search was reasonable for purposes of the Fourth Amendment to the United States Constitution, we exercise our independent judgment." (*Simon*, at p. 120.)

1. Consensual Encounter

Montiel contends that Officer Chavarria had detained him when Officer Bribiesca conducted the patdown search, and Chavarria lacked reasonable suspicion that Montiel was involved in criminal activity. Montiel argues that the interaction between Montiel and the officers was not consensual because the officers "ran" his criminal history and told him that he was free to leave, which are "indicative of the termination of a detention, not a consensual encounter."

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' [Citations.] Our state Constitution has a similar provision. (Cal. Const., art. I, § 13.) A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229.) "[T]he temporary detention of a person for the purpose of investigating possible criminal activity may, because it is less intrusive than an arrest, be based on 'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity." (*Id*. at p. 230.)

However, not all police interactions with individuals constitute a seizure. "Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*).) "An officer may approach a person in a public place and ask if the person is willing to answer questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution. [Citation.] Such consensual encounters present no constitutional concerns and do not require justification." (*People v. Brown* (2015) 61 Cal.4th 968, 974 (*Brown*).)

"[A] person is seized 'if " 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,' " ' or ' " 'otherwise terminate the encounter. . . .' " ' " (*Brown, supra*, 61 Cal.4th at p. 974.) "Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*Manuel G., supra*, 16 Cal.4th at p. 821.)

Taking into account all of the surrounding circumstances, we conclude that Montiel was not detained when Officer Bribiesca searched him. Officer Chavarria had already told Montiel that he was free to leave, and no facts suggest that Montiel was not free to leave. Montiel was not restrained in any way. The officers did not draw their weapons, touch Montiel, or give him any commands to stay prior to beginning the patdown search. The officers were going to search Cortez's car, but there was no evidence that Montiel had any belongings inside the car. The officers recognized Montiel from prior contacts, suggesting that Montiel was familiar with the area and could have left.[3]

Montiel concedes that Officer Chavarria's statement that Montiel was free to leave, which occurred before Bribiesca's search of Montiel's pockets, terminated any detention that might have occurred. Under these circumstances, the interaction between Montiel and Bribiesca when Bribiesca conducted the search was a consensual encounter for which the officers did not need reasonable suspicion of criminal activity.

[3] Montiel argues on appeal that he was "undoubtedly" waiting for Cortez "i.e., his ride," but cites no facts in the record that Montiel had to remain at the motel because he was waiting for his ride. There was no testimony at the preliminary hearing about why Montiel was at the motel, how he got there, or how he intended to leave.

2. Consent to Conduct a Patdown Search

Montiel contends that he did not give Officer Bribiesca consent to conduct a patdown search because Montiel's "consent" was simply an acquiescence to a claim of lawful authority, rendering any consent involuntarily given. (See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548–549.) The Attorney General counters that substantial evidence supports the trial court's implied finding that Montiel voluntarily consented to a patdown search. We need not resolve this dispute, because, as we explain below, Bribiesca's conduct exceeded the scope of a patdown search, and there is no evidence Montiel consented to anything other than a patdown search.

Bribiesca's testimony was that Montiel "gave me consent to pat him down for weapons. I explained to him that it would not consist of me going into his pockets." When asked specifically by the prosecutor about what he said, Bribiesca stated "I told him if it was okay to conduct a pat down for weapons." According to Bribiesca's testimony, Montiel responded "yes." When Bribiesca found the methamphetamine pipe, Montiel told Bribiesca that he no longer consented to Bribiesca's search.

Therefore, even crediting Bribiesca's account that Montiel voluntarily consented to a patdown search (which the trial court implicitly did when it denied the motion to suppress), the scope of Montiel's consent extended only to a patdown of the exterior of Montiel's clothing for evidence of weapons. We turn now to the question whether Bribiesca's seizure of the pipe falls within either the scope of a patdown search or an exception to the warrant requirement.

3. The "Plain Touch" Exception

An officer "may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.' [Citation.] 'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .' [Citation.] Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to

that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.' [Citation.] If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under [*Terry v. Ohio* (1968) 392 U.S. 1] and its fruits will be suppressed." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373 (*Dickerson*).)

A patdown search does not allow an officer to reach inside a suspect's pocket. "[T]he search of an interior pocket for contraband can only be made incident to an arrest, not merely as part of the investigative detention." (*People v. Holt* (1989) 212 Cal.App.3d 1200, 1205.)

However, under the "plain touch" exception to the warrant requirement, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent" as contraband, then the officer may seize the object without a warrant. (*Dickerson*, *supra*, 508 U.S. at pp. 375–376; *People v. Dibb* (1995) 37 Cal.App.4th 832, 836 [describing the " 'plain feel' " or " 'plain touch' " exception to the warrant requirement].)

In upholding the plain touch exception to the warrant requirement, the United States Supreme Court has cautioned that "the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband *before seizing it* ensures against excessively speculative seizures." (*Dickerson*, *supra*, 508 U.S. at p. 376, italics added.) The court observed "[t]he seizure of an item *whose identity is already known* occasions no further invasion of privacy." (*Id*. at p. 377, italics added.)

In *Dickerson*, the United States Supreme Court upheld the suppression of the narcotics found in the patdown search because the officer had squeezed the soft material inside the defendant's pocket before determining it was crack cocaine. "Although the officer was lawfully in a position to feel the lump in [the defendant's] pocket . . . the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search,

one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of [defendant's] pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional." (*Dickerson*, *supra*, 508 U.S. at p. 379.)

If an object encountered during a patdown search is a weapon, officers may retrieve it from the person being searched. (See *Terry v. Ohio*, *supra*, 392 U.S. at p. 30.) When the patdown "reveals a hard object that might be a weapon, the officer is justified in removing the object into view." (*People v. Limon* (1993) 17 Cal.App.4th 524, 535.) If the object is not a weapon, the incriminating character of the object must be "immediately apparent" to the officer before he may remove it from the person. (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1237.)

The question we confront here is whether the contraband nature of the methamphetamine pipe was "immediately apparent" to Officer Bribiesca before he removed the object from Montiel's pocket. The trial court made no explicit factual findings on this point. We defer to a trial court's implicit factual findings if supported by substantial evidence. (*Simon*, *supra*, 1 Cal.5th at p. 120.)

The prosecution elicited no evidence that Officer Bribiesca was aware of the incriminating nature of the pipe before he removed it from Montiel's pocket. The prosecutor asked Bribiesca if he found anything when he patted Montiel down. Bribiesca said "[y]es," and "I located a glass methamphetamine pipe in his left pant pocket." The prosecutor then asked whether Bribiesca spoke with Montiel once he had found the pipe. Bribiesca replied, "Yes. When I retrieved the pipe from his left pant pocket [Montiel] turned to me and he told me that he no longer gave me consent to continue my search."[4]

[4] Officer Chavarria's testimony on this point was similar to Bribiesca's account. The prosecutor asked Chavarria if Bribiesca found anything in his search of Montiel. Chavarria simply testified Bribiesca "immediately located a methamphetamine pipe in his left pocket." Chavarria's testimony provides no information about when and how Bribiesca determined the object in Montiel's pants was a methamphetamine pipe.

The record is completely silent on the critical facts of when and how Bribiesca determined that the pipe was contraband. The timing and method of discovery of the pipe determine whether Montiel's Fourth Amendment rights were violated. If Bribiesca made this determination during the patdown search itself—without any manipulation of the pipe—then seizure of the pipe would have been lawful pursuant to the "plain touch" exception to the warrant requirement. (See *Dickerson, supra*, 508 U.S. at p. 379.) However, if Bribiesca discovered the incriminating character of the pipe only after removing it from the pocket, or after manipulating it inside the pocket in some way, then its subsequent seizure violates the Fourth Amendment, and it must be suppressed. (*Ibid*.)

The Attorney General contends that the "language" of Bribiesca's testimony "conveyed that Officer Bribiesca identified the pipe based on its distinctive shape." In support of this contention, the Attorney General cites to a federal case in which the court denied a motion to suppress when an officer located a crack pipe in a patdown search. (*Ingram v. City of Los Angeles* (C.D. Cal. 2006) 418 F.Supp.2d 1182, 1192 (*Ingram*).) But the evidence elicited in that case highlights the evidentiary deficiencies here. In the federal case, the officer submitted a declaration that stated, " 'During the patdown search, I felt a cylindrical-shaped object in an outside pocket of Plaintiff's jacket. Believing the object to be a smoking device or pipe, I removed the object from Plaintiff's pocket. The object was a glass pipe that was burned on one end and was used to smoke crack cocaine.' " (*Ibid*.) The undisputed evidence submitted in *Ingram* established what the officer felt and when he felt it. These key facts are absent here. In fact, there was no testimony at all about how Officer Bribiesca conducted the patdown search and when and how he determined the nature of the pipe.

Because the record is silent on the salient facts, there is not substantial evidence to support an implicit finding that the incriminating nature of the contraband was immediately apparent to Bribiesca in the patdown search. We do not suggest that the

prosecution could not have elicited the evidence necessary to satisfy the plain touch exception to the warrant requirement; we conclude only that it failed to do so.

The prosecution bore the burden of demonstrating that Bribiesca's discovery of the pipe fell under the "plain touch" exception. (*People v. Collins* (1970) 1 Cal.3d 658, 662.) The prosecution failed to carry this burden when it elicited no evidence about when and how Bribiesca determined the pipe was contraband. For these reasons, the trial court erred in its determination that Officer Bribiesca's seizure of the methamphetamine pipe from Montiel's pocket did not violate the Fourth Amendment.

4. "Fruits" Analysis

The Attorney General does not address Montiel's contention that, if we determine the seizure of the pipe was unlawful, then the officers' subsequent seizure of the gun, and Montiel's incriminating statements, are fruits of the prior unlawful seizure that also must be suppressed. In its opposition to the motions to suppress in the trial court, the district attorney also did not argue that the taint of any illegality in the seizure of the pipe was attenuated before the discovery of the gun and Montiel's confession such that they should not be suppressed as "fruits" of an illegal seizure.

We may address this issue on appeal, even if not explicitly litigated in the trial court, if its factual basis is "fully set forth in the record." (*People v. Boyer* (2006) 38 Cal.4th 412, 449.) "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, [citation], but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' [Citation.] It 'extends as well to the indirect as the direct products' of unconstitutional conduct." (*Segura v. United States* (1984) 468 U.S. 796, 804.) However, "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.' " (*Id*. at p. 805.) " 'Relevant factors in this "attenuation" analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence

of intervening circumstances, and the flagrancy of the official misconduct.' " (*People v. Brendlin* (2008) 45 Cal.4th 262, 269.)

Officer Bribiesca discovered the gun in Montiel's right pocket shortly after seizing the pipe. Although the timing of Montiel's statement to Officer Chavarria is not entirely clear from the record, it appears Montiel made it later that day at the police station.[5] The record from the preliminary hearing contains no evidence of any intervening event or significant lapse of time that would dissipate the "taint" of the illegal seizure of the pipe. We therefore conclude that Montiel's motion, which sought to suppress "all evidence both tangible and intangible, obtained by the Watsonville Police Department as a result of the warrantless detention, search and arrest of defendant which occurred on November 22, 2017," should have been granted.

For these reasons, we reverse the judgment, vacate the conviction and order the matter remanded to the trial court with directions to grant Montiel's motion to suppress.

III. DISPOSITION

The judgment is reversed, the conviction is vacated, and the matter is remanded. On remand, the trial court shall vacate its order denying Montiel's motion to suppress the evidence and shall enter a new order granting that motion.

[5] The prosecutor asked Officer Chavarria "At some point later did you end up interviewing the defendant?" Chavarria responded "I did." The prosecutor later referenced Officer's Chavarria's conversation with Montiel "at the station."

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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